



IP ITeasers Post 023:

What is art? According to the judiciary...

So far we have considered a number of judgments showing lawyers and judges attempting to squeeze “square peg” artworks into the “round holes” provided by the closed list of artistic works provided under the Copyright, Designs and Patents Act 1988.

This week we consider an example of how German judges dealt with the application of copyright protection to an unusual type of work. The work in question was the “Wrapped Reichstag” by Christo and Jeanne-Claude which was installed for a period of 14 days in 1994. Images of the project, together with preparatory drawings and models, can be found on the artists’ website here <https://bit.ly/3x5ZXJM>. It became the subject of litigation when an unauthorised party sold postcards using photographs of the installation. It reached the Bundesgerichtshof (German Supreme Court) in 2002 (*RE POSTCARDS OF THE WRAPPED REICHSTAG* (CASE I ZR 102/99) reported in English at [2004] E.C.C. 25).

It is interesting to speculate how a British judge would have determined the case. The “work” is the wrapping of the Reichstag building in Berlin in cloth. No doubt lawyers for the Defendant would have argued that there wasn’t a work which attracted copyright protection at all. It is not a work of architecture, but the application of new material to an existing work of architecture. There is no separately recognised category in UK copyright law for “installation art”. The best candidate would probably be “sculpture” - but there is no permanent manipulation of form. The Claimants would probably have to have resorted to also pleading indirect infringement of the preparatory sketches and models which were clearly graphic works and sculptures. It would have no doubt been a fascinating case for the lawyers and an expensive one for the clients.

So what was the judicial determination of this interesting question? The Bundesgerichtshof said: “the project “Wrapped Reichstag” is protected by copyright ... Since it is a distinctive creation of an individual character, which in its specific form undoubtedly demonstrates the degree of artistic design that is necessary for copyright protection.” There was no philosophising on the boundaries of artistic mediums, nor was the fact that the work qualified copyright protection even appealed. The first instance and appeal courts simply applied a test akin to the EU test and held that it was too obvious that this was the sort of creation to which copyright is intended to apply to be worth debate. German lawyers are certainly missing out on some fun, but one cannot deny the efficiency of the approach.